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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

\* \* \*

VICTOR PATINO,

Plaintiff,

v.

LAS VEGAS METROPOLITAN POLICE  
DEPARTMENT, *et al.*,

Defendants.

Case No. 2:15-cv-00009-RFB-PAL

**OPINION & ORDER**

Defendants' Motion for Summary Judgment  
(Dkt. No. 18) and Plaintiff's Motion for Partial  
Summary Judgment (Dkt. No. 21)

**I. INTRODUCTION**

Before the Court are Defendants' Motion for Summary Judgment (Dkt. No. 18) and Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 21). For the reasons elaborated below, Defendants' Motion for Summary Judgment is granted, and Plaintiff's Motion for Partial Summary Judgment is denied.

**II. BACKGROUND**

Victor Patino filed a Complaint against Sergeant Wilson, Sheriff Gillespie, and the Las Vegas Metropolitan Police Department ("LVMPD") on January 3, 2015. (Dkt. No. 1). The complaint brought four causes of action: a claim against Sergeant Wilson alleging violation of Patino's Fourth and Fourteenth Amendment rights under 42 U.S.C. § 1983; a Monell claim against the LVMPD and Sheriff Douglas Gillespie, under 42 U.S.C. § 1983; state law negligence claims; and intentional infliction of emotional distress claims.

Defendants filed a Motion for Summary Judgment on February 18, 2016. (Dkt. No. 18).

1 Patino filed his Response on March 18, 2016, (Dkt. No. 26), and Defendants filed a Reply on April  
2 5, 2016 (Dkt. No. 29). Patino filed a Motion for Partial Summary Judgment on February 26, 2016.  
3 (Dkt. No. 21). Defendants filed a Response on March 18, 2016, (Dkt. No. 25) and Plaintiff filed a  
4 Reply on April 11, 2016 (Dkt. No. 30).

5 Plaintiff's Motion for Partial Summary Judgment is raised as to three issues also raised in  
6 Defendant's Motion for Summary Judgment: Defendant Wilson's entry into Patino's backyard,  
7 Defendant Wilson's seizure of Patino's dog, Bubba, and Defendant Wilson's entitlement to  
8 qualified immunity. The same arguments are raised both in Plaintiff's Motion for Partial Summary  
9 Judgment and in his Response to Defendant's Motion for Summary Judgment. Therefore, the  
10 Court addresses both Motions jointly.

#### 11 **A. Undisputed and Disputed Facts**

12 The Court incorporates its discussion of the undisputed and disputed facts from its hearing  
13 on September 2, 2016. The Court discusses and elaborates these facts here.  
14

##### 15 **a. Undisputed Facts**

16 The Court finds the following facts to be undisputed. On January 6, 2013, Sergeant Wilson  
17 responded to a call on 211 Earl Street, located directly behind 16<sup>th</sup> Street, where Patino resides.  
18 The reporting caller told LVMPD dispatch that an ex-boyfriend was lying in her front yard refusing  
19 to leave. Sergeant Wilson responded alone to the Earl Street call just before 2 pm. Upon arrival at  
20 the location, he did not find anyone matching the description of the suspect. He exited his marked  
21 LVMPD vehicle and began walking the property in hopes of locating the suspect or the person  
22 reporting.

23 Sergeant Wilson called dispatch to verify the address. (Defs.' Ex. 6, "LVMPD Radio  
24 DTAC"). About 15 seconds later, Sgt. Wilson informed dispatch that he heard what he thought to  
25 be a gunshot "right across the street from me." (Defs.' Ex. 6). Wilson walked across the street to  
26 the other side of Earl Street. Fearing someone may be hurt or in danger, he attempted to look into  
27 the backyards of the houses on Earl Street. As he was investigating, he heard a sound he believed  
28 to be moaning or a muffled yell. Wilson updated dispatch with this new development and informed

1 them that the sound was coming from a brown house on 16<sup>th</sup> Street. (Defs. Ex. 6). He informed  
2 dispatch that the exact address was 147 S. 16<sup>th</sup> St. Around this time, a citizen called LVMPD  
3 dispatch and reported hearing what sounded like fireworks being lit off in the area. Wilson  
4 acknowledged this report. At that point, he drove his vehicle around the street, parked on 16<sup>th</sup>  
5 Street, and called for backup.

6 The 147 S. 16<sup>th</sup> Street property has two separate living structures – the main house and a  
7 “Casita”, a small residence in the back. There is a pathway from the front yard back to the Casita,  
8 and it is not uncommon for visitors to walk directly back to the Casita and bypass the main  
9 residence. The property has a fence that encloses the backyard and the Casita. After arriving at 147  
10 S. 16<sup>th</sup> St., Wilson was met by Officer Joseph Hemphill, Officer Zachary Baughman, and Officer  
11 Mark LaFavor. Wilson and Hemphill decided to check the backyard of the property to ensure that  
12 no one was injured or otherwise in danger. According to LVMPD policy, officers can search a  
13 residence, without a warrant, when exigent circumstances or an emergency exists. (Defs. Ex. 8).  
14 Wilson and Hemphill entered the yard to ensure that no one was injured or in danger based upon  
15 Wilson’s good faith belief that he had heard a gunshot and a moaning sound.

16 Wilson and Hemphill walked to the gate enclosing the backyard and looked into the  
17 backyard. They could see portions of the backyard as well as the Casita. They did not see anyone  
18 from their vantage point, but decided to search the backyard and approach the Casita to make sure  
19 no one was injured. Wilson took the lead and entered the backyard, followed by Hemphill. Wilson  
20 entered the backyard and headed towards the Casita. As he walked into the backyard, Bubba,  
21 Patino’s pit bull, came into Wilson’s view. Wilson warned Hemphill, “Dog,” and began to back  
22 up. When he began to back up, Bubba turned towards Wilson with his ears back. Bubba began  
23 running at Wilson at a full sprint. A second pit bull was in the yard and also began approaching  
24 Wilson. Wilson and Hemphill began backing up quickly. Wilson attempted to get the pit bull to  
25 stop by yelling “Stop! Stop!”.

26 When Bubba was within two feet of Wilson, Wilson fired his service weapon at Bubba.  
27 Hemphill also perceived Bubba as a serious threat and was preparing to use his shotgun to shoot  
28 the dog. Wilson called the incident into dispatch and requested animal control. Wilson began

1 looking for the second pit bull, but it had disappeared.

2 Patino did not witness any of these events, and was sleeping at the main residence and was  
3 woken up by his mother, who heard the shots. Patino exited and saw five or six officers in the  
4 backyard. He realized his pit bull had been shot, and he began questioning the officers.  
5 Subsequently, Patino participated in the LVMPD investigation of what had occurred.

6  
7 **a. Disputed Facts**

8 According to Patino, the fence surrounding his property had a “Beware of Dog” sign  
9 affixed to it. Wilson does not recall having seen such a sign, and none of the attendant Officers  
10 from the date of the incident recall having seen the sign. During discovery, Defendants asked  
11 Patino to produce a photograph of the sign, but Patino responded that “upon information and belief  
12 Defendant officers took down the Beware of Dog sign” and denied having it in his possession. He  
13 has produced no other evidence or deposition testimony regarding the sign.

14 Patino also alleges that the LVMPD had previously been to the Patino residence and was  
15 on notice about his dogs. None of the officers on the scene on the date of the incident had  
16 previously been to Patino’s residence. Patino has not made out any connection between the officers  
17 who had allegedly been there once or twice prior, and any of the other officers on the scene the  
18 day Bubba was shot.

19  
20 **III. LEGAL STANDARD**

21 Summary judgment is appropriate when the pleadings, depositions, answers to  
22 interrogatories, and admissions on file, together with the affidavits, if any, show “that there is no  
23 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”  
24 Fed. R. Civ. P. 56(a); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When considering  
25 the propriety of summary judgment, the court views all facts and draws all inferences in the light  
26 most favorable to the nonmoving party. Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 960  
27 (9th Cir. 2011). If the movant has carried its burden, the non-moving party “must do more than  
28 simply show that there is some metaphysical doubt as to the material facts . . . . Where the record  
taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no

1 genuine issue for trial.” Scott v. Harris, 550 U.S. 372, 380 (2007) (alteration in original) (internal  
2 quotation marks omitted). A genuine issue exists, precluding summary judgment, so long as “the  
3 evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson  
4 v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

#### 5 6 **IV. ANALYSIS**

##### 7 **A. Section 1983 Claim Against Officer Wilson for Entry Into Backyard and** 8 **Shooting of Dog**

9 To make out a prima facie case under § 1983, a plaintiff must show that a defendant: (1)  
10 acted under color of law, and (2) deprived the plaintiff of a constitutional right. Borunda v.  
11 Richmond, 885 F.2d 1384, 1391 (9th Cir. 1989). In cases involving the shooting of a dog, the claim  
12 is one for unlawful seizure of property under the Fourth Amendment because “the Fourth  
13 Amendment protections of ‘persons’ does not extend to dogs.” Sandoval v. Las Vegas Metro  
14 Police Dep’t, 756 F.3d 1154, 1167 n. 10 (9th Cir. 2014). Therefore, the issue for the Court is  
15 whether Wilson unlawfully seized Patino’s property in violation of the Fourth Amendment when  
16 he shot and killed Bubba. The Court also addresses whether Wilson’s entry into the backyard was  
17 reasonable.

18 Defendants argue that Plaintiff has not raised a Fourth Amendment claim regarding  
19 Wilson’s illegal entry into his backyard, and that therefore this issue need not be addressed.  
20 Although Plaintiff did not clearly state, in the relevant count of his Complaint, that the Fourth  
21 Amendment claim applies to the warrantless entry into Patino’s backyard, the Complaint does  
22 allege as part of that claim that Wilson entered the yard without permission. Although Defendants  
23 argue the claim was not properly raised, they nevertheless addressed the reasonableness of the  
24 entry in their briefing and oral arguments. Construing Patino’s Complaint liberally to include a  
25 Fourth Amendment claim for both warrantless entry into the yard and shooting of the dog, the  
26 Court analyzes both grounds.

27 Here, Wilson’s entry into the backyard was reasonable under the circumstances because he  
28 had reasonable grounds to believe there was an emergency occurring, involving a potentially  
injured person in need of immediate assistance. Searches and seizures without a warrant are

1 “presumptively unreasonable.” Payton v. New York, 445 U.S. 573, 590 (1980). A set of exceptions  
2 exist to this warrant requirement, including the “emergency” doctrine. The emergency exception  
3 applies where police officers are responding in their “community care taking function” to what  
4 they reasonably perceive as an emergency involving a threat to life or property. U.S. v. Stafford,  
5 416 F.3d 1068, 1073 (9th Cir. 2005). In order to justify a warrantless search under the emergency  
6 doctrine: (1) the police must have reasonable grounds to believe that there is an emergency and an  
7 immediate need for the assistance for the protection of life or property; (2) the search must not be  
8 primarily motivated by intent to arrest and seize evidence; and (3) there must be some reasonable  
9 basis, approximating probable cause, to associate the emergency with the area or place to be  
10 searched. See id. Plaintiff did not address the emergency exception to the warrant requirement, but  
11 rather focused his argument on the “exigency” exception, which applies to evidentiary or  
12 investigatory searches and is not the relevant exception in this case.

13 In this case, the undisputed facts show that Wilson had reasonable grounds to believe there  
14 was an emergency. He heard what sounded like gunshots coming from the direction of Patino’s  
15 home. He also heard what he perceived to be an injured person making a distressed sound from  
16 Patino’s backyard or the Casita. He relayed all of these perceptions over his radio to dispatch.  
17 Wilson did not have any investigatory or evidence-seeking motivation when he entered Patino’s  
18 backyard. He entered it with the intention of approaching the Casita in the backyard to make sure  
19 that nobody was in immediate danger. Therefore, Wilson had an objectively reasonable basis for  
20 believing there was an emergency and for associating the emergency with Patino’s house, and his  
21 entry into Patino’s backyard did not constitute an unreasonable entry or search. Even if other,  
22 reasonable methods of investigating the sounds, like knocking on the front door, existed, that does  
23 not make Wilson’s backyard entry objectively unreasonable, especially in light of Patino’s  
24 concession that individuals often approached the Casita directly through the pathway to the  
25 backyard.

26 Furthermore, Wilson’s decision to shoot the pit bull was reasonable based on the  
27 undisputed factual record. The shooting of a dog must be reasonable under the totality of the  
28 circumstances. San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d

1 962, 975 (9th Cir. 2005). “The Fourth Amendment protections of ‘persons’ does not extend to  
2 dogs.” Id. To determine whether the shooting of a dog was reasonable, the court must balance the  
3 nature and quality of the intrusion on Plaintiff’s Fourth Amendment interests against the  
4 countervailing governmental interests at stake. *See Graham v. Connor*, 490 U.S. 386, 396 (1989).  
5 Here, Sergeant Wilson’s conduct was objectively reasonable under the totality of the  
6 circumstances. He entered the backyard with the intention of responding to a perceived emergency.  
7 In what he and his fellow officer estimated to be about five seconds, the pit bull began running  
8 towards him aggressively across the backyard. Hemphill, Wilson’s back-up officer, also perceived  
9 the pit bull to be a serious threat and had his shotgun ready to fire as well. Wilson yelled for the  
10 dog to stop, and when the dog was within two feet of him, he reacted to protect himself by shooting  
11 the dog. Officers are not required to avail themselves of the least intrusive means when responding  
12 to an exigent or emergency situation. *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). The Court  
13 finds that had Wilson refrained from shooting and instead defended himself against the dog by  
14 other means while being attacked in close range, he would have faced a considerable risk of serious  
15 injury. Therefore, under the totality of the circumstances, on the undisputed facts, Wilson’s  
16 decision to shoot the pit bull was reasonable.

17 Plaintiff argues that the alleged “Beware of Dog” sign gave Wilson forewarning of the  
18 dogs’ presence and made his actions unreasonable. Aside from Plaintiff’s bare allegation, he has  
19 provided no evidentiary support for the fact that such a sign existed. Bare allegations are  
20 insufficient to create a genuine dispute of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477  
21 U.S. 242 (1986). Even crediting Patino’s allegation that a “Beware of Dog” sign existed, regardless  
22 of the sign’s presence, if Wilson was responding to the perception of a shot having been fired and  
23 a potential victim in time-sensitive distress, it would have been reasonable for him to enter the  
24 backyard. As Wilson indicated, had he read such a sign, he would have entered the yard regardless,  
25 because of the possibility of a distressed individual needing assistance. The Court agrees that this  
26 would also have been reasonable. Plaintiff cites to the Hells Angels Ninth Circuit case as  
27 establishing that, when an officer has any advance notice of the presence of a dog, he or she must  
28 take precautionary measures to try and preserve the dog’s life. 402 F.3d 962 (9th Cir. 2005).



1 However, the Court does not read Hells Angels to stand for such a proposition. In that case, the  
2 officers knew of the plaintiffs' dogs a week prior to executing search warrants, and had time to  
3 develop strategies for immobilizing the dogs non-lethally, but failed to do so. The Ninth Circuit  
4 explicitly made note in its holding that "this case is not the kind where the officer was reacting to  
5 a sudden unexpected situation, where the officers were confronted with exigent circumstances.  
6 The Fourth Amendment allows officers to use a certain amount of force because they are often  
7 forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly  
8 evolving...". Id. at 978 (internal citations omitted). In the present case, Wilson was in precisely  
9 the situation Hells Angels describes as being distinct from the circumstances of a search warrant's  
10 execution. He believed himself to be responding to an emergency shooting with a potentially  
11 injured victim.

12 Although the Court need not reach this issue, the Court also finds that, to the extent there  
13 was a constitutional violation, Wilson would be entitled to qualified immunity. "[T]he doctrine of  
14 qualified immunity protects government officials from liability for civil damages insofar as their  
15 conduct does not violate clearly established statutory or constitutional rights of which a reasonable  
16 person would have known." Pearson v. Callahan, 555 U.S. 223, 231 (2009). Qualified immunity  
17 shields an officer from liability even if his or her action resulted from "mistake of law, a mistake  
18 of fact, or a mistake based on mixed questions of law and fact." Id. To determine whether an officer  
19 is entitled to qualified immunity, a two-step test is employed: first, the court decides whether the  
20 officer violated a plaintiff's constitutional right; then the court proceeds to determine whether the  
21 constitutional right was clearly established in light of the specific context of the case. The law  
22 allows the district court to "exercise [its] sound discretion in deciding which of the two prongs of  
23 the qualified immunity analysis should be addressed first." Matteo v. Agarano, 661 F.3d 433, 440  
24 (9th Cir. 2011). As the Court has analyzed above, Wilson did not commit a constitutional violation  
25 in this case. Furthermore, under this Court's analysis of the Hell's Angels case, that case does not  
26 address the specific context of emergency exceptions to the Fourth Amendment. Thus, even if  
27 there was a constitutional violation, there was and is no clearly established right to an officer  
28 having to choose the least intrusive plan of entry or coming up with a method of subduing a dog,



1 when responding to an *emergency* situation, even if a sign were to put the officer on notice of the  
2 dog's potential presence.

3 Therefore, the Court grants summary judgment in favor of Defendant Wilson as to Patino's  
4 Fourth and Fourteenth Amendment claims against him. The Court also holds, in the alternative,  
5 that qualified immunity shields Wilson from liability in this case. His entry into the property was  
6 reasonable and falls into the emergency exception for warrantless searches. At most, he made a  
7 "reasonable mistake" in entering the backyard when there was no actual emergency, and is  
8 protected by qualified immunity. His shooting of Bubba was a reasonable, split-second reaction  
9 amidst emergency circumstances.

#### 10 **B. Section 1983, Monell Claim Against LVMPD and Sheriff Gillespie**

11 "A suit against a governmental official in his official capacity is equivalent to a suit against  
12 the governmental entity itself." Larez v. Los Angeles, 946 F.2d 630, 645 (9th Cir. 1991).  
13 Therefore, the official capacity claims against Sheriff Gillespie under § 1983 will be analyzed  
14 together with Patino's claims against the LVMPD. Under Monell, when a municipal policy of  
15 some nature is the "driving force" behind an unconstitutional action taken by municipal  
16 employees, the municipality will be liable. Monell v. Dep't of Social Services, 436 U.S. 658  
17 (1978). Liability exists where the unconstitutional action "implements or executes a policy  
18 statement, ordinance, regulation, or decision officially adopted and promulgated" by municipal  
19 officers, or where the constitutional deprivation is visited pursuant to governmental "custom". Id.  
20 Plaintiffs can recover under three different theories: "commission", a local government  
21 implementing its official policies or established customs, such as inadequate training of  
22 governmental officials; "omission", the government's omission to an official policy, such as a  
23 failure to train; or "ratification", a policymaker's purposeful approval of an employee's  
24 unconstitutional conduct. Clouthier v. Cnty. of Contra Costa, 591 F.3d 1232, 1249-50 (9th Cir.  
25 2010).

26 As previously analyzed, the Court finds no constitutional violation against Patino on the  
27 basis of Wilson's conduct on the date of the incident. His entry into the backyard in response to a  
28 perceived emergency and injury that was thought to be located at Patino's residence was

1 reasonable, and his shooting of the pit bull who was running towards him and was two feet away  
2 from him was also reasonable. Therefore, there was no unconstitutional action to undergird a  
3 Monell claim.

4 Furthermore, Patino has not generated any evidence of an unconstitutional policy or  
5 custom, or a lack of training or supervision. Just because, as Patino states, the dog shooting was  
6 found to be “within policy”, that does not mean LVMPD’s policy, which states that the use of a  
7 firearm in self-defense is permitted to “prevent serious harm to the officer or others...” is  
8 unconstitutional. Additionally, Patino has provided no evidence of “deliberate indifference” to  
9 training or supervision of officers. Deliberate indifference is shown when the need for “training is  
10 so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the  
11 policymakers of the municipality can reasonably be said to have been deliberately indifferent to  
12 the need.” City of Canton v. Harris, 489 U.S. 378, 390 (1989).

13 At the hearing on this motion, Patino argued that the LVMPD’s investigatory determination  
14 that there was no wrongdoing on Wilson’s part constituted evidence of ratification. Patino’s brief  
15 cites to his expert report, stating that Sheriff Gillespie personally ratified Wilson’s killing of Bubba  
16 because Wilson was not punished for misconduct. To show ratification, a plaintiff must show that  
17 the authorized policymakers approve a subordinate’s decision and the basis for it. Lytle v. Carl,  
18 382 F.3d 978, 987 (9th Cir. 2004). The policymaker must have knowledge of the constitutional  
19 violation and actually approve of it. Id. “[M]ere failure to overrule a subordinate’s actions, without  
20 more, is insufficient to support a § 1983 claim.” Id. Here, because Wilson’s conduct was not  
21 unconstitutional, Plaintiff’s arguments about ratification are inapposite. The LVMPD’s findings  
22 that Wilson’s action were in keeping with applicable policies and procedures, which are  
23 themselves consistent with the requirements of the Fourth Amendment, do not amount to a  
24 ratification of an unconstitutional practice.

25 Therefore, the Court grants summary judgment in favor of Defendants as to Patino’s  
26 Monell claims against the LVMPD and Sheriff Gillespie.

27  
28 **C. State Law Negligence and IIED Claims**  
**a. Negligence Claim**

1 To prove a claim for negligence, the plaintiff must demonstrate that he was owed a duty of  
 2 care; that defendant breached that duty; that the breach was the legal cause of Patino's injury; and  
 3 that Patino suffered damages. Scialabba v. Brandise Const. Co., 112 Nev. 965, 968 (1996). The  
 4 Court incorporates by reference here its discussion of the reasonableness of the officers' actions.  
 5 There is therefore no basis for concluding that the officers breached any duty owed to Patino.  
 6 Wilson's entry into the property was objectively reasonable and falls into the emergency exception  
 7 for warrantless searches. Therefore, the Court grants summary judgment in favor of Defendants as  
 8 to the state law negligence claim against Wilson.

### 9 **b. Intentional Infliction of Emotional Distress (IIED)**

10 In order to prevail on a claim of intentional infliction of emotional distress, a plaintiff must  
 11 show (1) extreme and outrageous conduct with either the intention of, or reckless disregard for,  
 12 causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress,  
 13 and (3) actual or proximate causation. Posada v. City of Reno, 851 P.2d 438, 444 (Nev. 1993).

14 Defendants have cited to Nev. Rev. Stat. 41.740, which is Nevada's statutory scheme for  
 15 recovery for the death of a pet. The statute allows for the reimbursement of certain expenses, but  
 16 prohibits the award of punitive and noneconomic damages for the death of a pet. N.R.S. 41.740(2).  
 17 Plaintiff has not cited to any case law that would create an exception in this case, and allow him  
 18 to recover for emotional distress due to the death of his pet. The Court therefore grants summary  
 19 judgment in favor of Defendants as to Patino's IIED claims, which are preempted by N.R.S.  
 20 41.740's statutory recovery scheme.

21 Additionally, the Court finds, as discussed above, that the undisputed facts demonstrate  
 22 that the officers did not engage in extreme or outrageous conduct. Plaintiff therefore cannot  
 23 establish a prima facie case for intentional infliction of emotional distress.

24 ...

25 ...

26 ...

27 ...

**V. CONCLUSION**

IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment is GRANTED as to all of Plaintiff's claims. Plaintiff's Motion for Partial Summary Judgment is DENIED.

DATED this 13th day of September, 2016.



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**RICHARD F. BOULWARE, II**  
**UNITED STATES DISTRICT JUDGE**